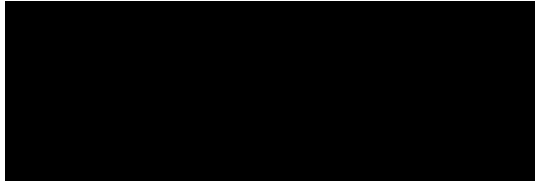




U.S. Citizenship
and Immigration
Services

Identifying information related to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B5

FILE:



Office: VERMONT SERVICE CENTER

Date:

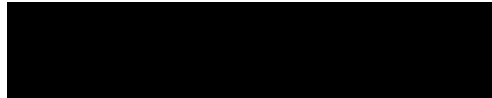
AUG 02 2005

EAC 03 246 52675

IN RE:

Petitioner:

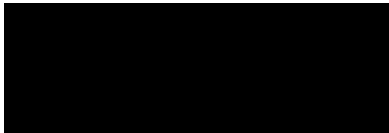
Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. Counsel acknowledges the correct proffered wage and priority date, but then attempts to explain the petitioner's ability to pay the proffered wage by relying on a later priority date and a smaller proffered wage than those relating to the initial petition. As will be discussed in more detail below, counsel provides no legal basis for this type of analysis.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 10, 2001. The proffered wage as stated on the Form ETA 750 is \$76,960 annually. The director relied on this priority date and this proffered wage in her decision. On page 3 of his appellate brief, counsel initially relies on the correct priority date but then begins his analysis using a different date and proffered wage. Specifically, counsel states:

On August 2, 2003, the petitioner filed an I-140 petition to classify the beneficiary under section 203(b)(3) of the Immigration and Nationality Act, accompanied by a Form ETA-750 that would have established a priority date of September 10, 2001. See **EXHIBIT A**. On August 25, 2004, the USCIS Vermont Service Center denied the aforementioned petition because the petitioner's submitted 2001 and 2002 Tax Returns failed to establish to the Service's satisfaction that the petitioner could pay the beneficiary's proffered salary of \$76,960.00 per year. The petitioner has since then filed tax returns for its 2003 tax year. See **EXHIBIT B**. Consequently, since the priority date for the denied petition begins on July 3, 2003, the petitioner's 2003 Tax Returns should be utilized to determine the petitioner's ability to pay the proffered wage of \$63,800 per year.

Counsel continues in the next section of the brief:

When the aforementioned petition was filed, the petitioner has submitted its 2002 Tax Returns as evidence of ability to pay the proffered wage of \$63,800.00 to the beneficiary from the priority date of July 3, 2003 as established by the submitted Form ETA-750. See **EXHIBIT A**.

The documents submitted on appeal are not labeled by exhibit. The first document is a receipt for the Form I-140, which reflects a filing date of September 2, 2003. The second document is a copy of the Form ETA-750A, which reflects a September 10, 2001 filing date, the priority date listed above and used by the director, and a proffered wage of \$76,960. Nowhere on these documents is there reflected a July 3, 2003 priority date or a proffered wage of only \$63,800. Counsel provides no legal authority that would allow us to use a later priority date or a lesser proffered wage for a substituted beneficiary or once a petition has been denied and offers no explanation from whence the July 3, 2003 date and \$63,800 proffered wage purportedly derive. As such, we will rely on the September 10, 2001 priority date and the \$76,960 proffered wage provided on the Form ETA-750A.

The petition seeks to substitute the beneficiary for the predecessor beneficiary listed on the Form ETA 750 labor certification. On the Form ETA 750B, signed by the predecessor beneficiary, the predecessor beneficiary claimed to have worked for the petitioner as of December 2000. On the Form ETA 750B, signed by the current beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2003. On the petition, the petitioner claimed to have been established on June 1, 2000, to have a gross annual income of \$500,000, no net annual income and to currently employ 10 workers. In support of the petition, the petitioner submitted Form 1120 Corporate tax returns for the petitioner for 2001. The tax return reflects the following information:

Net income	(\$260)
Current Assets	\$787
Current Liabilities	\$0
Net current assets	\$787

In addition, the petitioner submitted evidence that the petitioner had paid the beneficiary year-to-date wages of \$3,333.33 as of August 21, 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 25, 2004, denied the petition.

On appeal, the petitioner submits its 2003 corporate tax return reflecting a net income of \$61,243 and net current assets of \$258,498 (current assets of \$433,480 minus current liabilities of \$174,982). In addition, the petitioner submits its unaudited financial statements for the year ending June 30, 2004, recent bank statements, 2004 checks and invoices, 2004 subcontracting agreements and a 2004 line of credit.

The unaudited financial statements for 2004 are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In calculating the ability to pay the proffered salary, we will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Moreover, a 2004 credit line does not relate back to the September 10, 2001 priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary or the predecessor beneficiary the full proffered wage in 2001, 2002 or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be

balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the predecessor beneficiary during 2001 or 2002, or that it paid the beneficiary the full proffered wage in 2003. In 2003, the petitioner's net current assets are more than sufficient to cover the proffered wage. As such, the petitioner has established its ability to pay the proffered wage in 2003. As stated above, however, neither the substitution of the beneficiary nor the denial of the petition alters the priority date of the labor certification underlying the petition, September 10, 2001. In 2001, the petitioner shows a net loss and net current assets of only \$787. Thus, the petitioner has not demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2001. The record contains no tax documentation relating to 2002. The petitioner has not demonstrated that any other funds were available to pay the proffered wage in 2001 or 2002. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.